

BRB Nos. 97-1643
and 97-1744

CHARLES S. SPROULL)	
)	
Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
STEVEDORING SERVICES OF)	
AMERICA)	
)	
and)	
)	
EAGLE PACIFIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeals of the Order on Motion for Award of Interest on Attorney's Fee of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Compensation Order of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudry (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Motion for Award of Interest on Attorney's Fee (88-LHC-2392) of Administrative Law Judge Alfred Lindeman, and the Compensation Order (Case No. 14-82112) of District Director Karen P. Staats, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge

which are rational, supported by substantial evidence, and in accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In his initial Decision and Order in this matter, the administrative law judge awarded claimant permanent partial disability compensation for an injury he sustained after a fall while working for employer on January 10, 1985, and denied employer a credit for vacation and holiday pay. Further, the administrative law judge granted employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f). On May 18, 1989, the administrative law judge awarded claimant’s counsel an attorney’s fee and costs totaling \$5,339.61. On January 10, 1994, the district director awarded claimant’s counsel a fee of \$1,300. Employer timely appealed the award of benefits to the Board, urging the Board to vacate the award of an attorney’s fee if the administrative law judge’s Decision and Order was reversed.¹ On appeal, the Board modified the administrative law judge’s average weekly wage finding as well as the amount of permanent partial disability compensation due claimant, deleting vacation pay from the calculation of claimant’s average weekly wage. The Board further awarded employer a credit for its disability payments for days claimant received both temporary total disability benefits and holiday pay. The Board affirmed the administrative law judge’s finding that claimant suffered a loss of wage-earning capacity and the award of an attorney’s fee, and reversed the administrative law judge’s award of Section 8(f) relief, and the district director’s denial of a Section 14(f) penalty. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., concurring and dissenting).

¹Claimant cross-appealed the administrative law judge’s decision, urging the Board to instruct the administrative law judge to consider the change in claimant’s work opportunity in evaluating his residual earning capacity, if the Board decided to remand the case. Additionally, claimant appealed the district director’s denial of a Section 14(f), 33 U.S.C. §914(f), penalty. The Director, Office of Workers’ Compensation Programs, also filed a cross-appeal with respect to the administrative law judge’s award of Section 8(f) relief.

Thereafter, claimant and the Director, Office of Workers' Compensation Programs (the Director), filed motions for reconsideration *en banc* before the Board. Subsequently, the Board reaffirmed its previous holding with respect to the calculation of claimant's average weekly wage, but vacated the Board's prior determination that employer is entitled to a credit for disability compensation paid to claimant on holidays for which he received holiday pay. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(*en banc*)(Brown and McGranery, JJ., concurring in part). Both parties appealed the case to the United States Court of Appeals for the Ninth Circuit. In its decision, the court affirmed the Board's calculation of claimant's wage-earning capacity, but held that the Board erred by reducing claimant's permanent partial disability compensation by deleting vacation pay from the calculation of claimant's average weekly wage. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997).

On May 8, 1997, employer paid the attorney's fee previously awarded by the administrative law judge. On July 7, 1997, claimant filed a Motion for Interest on Attorney Fee Award with the administrative law judge, asserting that inasmuch as the long delay in the payment of the fee had substantially reduced the value of his fee award, the administrative law judge should reopen the fee award and compensate him for the delay by awarding interest on the fee. Claimant also filed a Motion for Award of Interest on Attorney's Fee with the district director. In an Order dated July 31, 1997, the administrative law judge dismissed claimant's motion on the grounds that as the issue of interest on the attorney's fee was not raised at the time the fee award was made and as the case had not been remanded to the to the Office of the Administrative Law Judges by the Board or any other tribunal, the fee award had become final and he did not have subject matter jurisdiction to consider the requested interest award. On August 15, 1997, the district director issued an Order dismissing claimant's motion on the ground that she lacked jurisdiction to grant the remedy sought.

On appeal, claimant argues that he is entitled to interest on the attorney's fee awards issued by the administrative law judge and the district director, as compensation for the substantial delay in payment because that delay was not due to any error in the fee award, but rather, to the appeals of the decision awarding benefits filed with the Board and the Ninth Circuit. Moreover, claimant contends that the administrative law judge and the district director erred in finding that they lacked jurisdiction to enter an interest award. Claimant contends that as payment of the fee award was legally impossible while the appeal was pending and it was not possible to reopen the fee award, once the administrative law judge's award of benefits was affirmed, this motion is the only means available to compensate him for the delay in

receiving his fee. Employer responds that the administrative law judge and district director correctly determined that they had no jurisdiction because the fee award had become final and was not subject to modification under 33 U.S.C. §922. Claimant has filed a reply brief, reiterating his argument that interest should be awarded on the attorney's fee awards issued by the administrative law judge and the district director.

The conclusion of the administrative law judge and the district director that the attorney's fee awards were final and that they accordingly lacked subject matter jurisdiction to decide whether an award of interest is appropriate is affirmed for the reasons stated in the Board's decision in *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41, 43 (1997). Claimant argues that awarding interest does not require re-opening the award but rather only a legal decision as to whether the previously issued order allowed for interest, and that the administrative law judge and the district director have jurisdiction over this issue as they entered the fee award originally. We disagree. Section 22 of the Act, 33 U.S.C. §922, which provides the only means under the Act for changing otherwise final compensation orders, does not provide a basis for re-opening a final attorney's fee award. See *Greenhouse*, 31 BRBS at 43. As an attorney's fee is not "compensation" within the meaning of Section 22, fee awards may not be modified pursuant to Section 22. *Fortier v. Bath Iron Works*, 15 BRBS 261 (1982). Inasmuch as the Act and the regulations do not provide a method to re-open a fee award which has become final, we reject claimant's arguments and affirm the administrative law judge's and district director's determinations that they lacked subject matter jurisdiction to address the interest issue in this case.

We note, moreover, that an award of interest on a fee is contrary to applicable law. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has held that an attorney's fee award under the Act is not a final judgment entitled to interest under 28 U.S.C. §1961. See *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3 (CRT)(9th Cir. 1996); *Hunt v. Director, OWCP*, 999 F.2d 419, 422 n.1, 27 BRBS 84, 89 n.1 (CRT)(9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991); *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987). See also *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995).² Accordingly, for the reasons previously stated, we reject claimant's

²Claimant argues that the policy of not awarding interest conflicts with the United States Supreme Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989). We disagree. In *Jenkins*, the Supreme Court held that an adjustment for delay in payment is an appropriate factor in the determination of what constitutes a

argument that he is entitled to interest on his attorney's fee awards.

reasonable fee under 42 U.S.C. §1988; it did not address the applicability of interest on fee awards under 28 U.S.C. §1961.

Accordingly, the administrative law judge's Order on Motion for Award of Interest on Attorney's Fee, and the district director's Compensation Order, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge